

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Application by SBC Communications, Inc.,)	
Pacific Bell Telephone Company,)	
And Southwestern Bell Communications)	WC Docket No. 02-306
Services, Inc. for)	
Provision of In-Region, InterLATA)	
Services in California)	
_____)	

REPLY COMMENTS OF XO CALIFORNIA, INC.

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November 4, 2002

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REPLY COMMENTS OF XO CALIFORNIA, INC.

I. INTRODUCTION

Pursuant to Public Notice DA 02-233,¹ XO California, Inc., (“XO”) submits these reply comments on the Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, “SBC Pacific”) for Provision of In-Region, InterLATA Services in California (the “Application”). For the reasons discussed herein as well as in XO’s initial comments filed on October 9, 2002, XO opposes the SBC Pacific Application and, therefore, urges the Commission to deny the Application.

In its initial comments, XO demonstrated that SBC Pacific’s Application is deficient for several reasons including, among others, that SBC Pacific’s rates for DS1 and DS3 loops are not cost-based.² Thus, SBC Pacific has not met checklist item 2. XO also established that SBC

¹ Public Notice, *Comments Requested on the Application by SBC Communications Inc. for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of California*, WC Docket No. 02-306 (Sept. 20, 20002) (comments due Oct. 9, 2002; reply comments due Nov. 4, 2002).

² XO also demonstrated that SBC Pacific has failed to provide nondiscriminatory access to provisioning,

Pacific's entry into the in-region InterLATA market would be adverse to the public interest, in part because SBC Pacific's performance incentive plan is inadequate to prevent backsliding or ensure compliance with the Act.

As explained in XO's October 9 comments, XO has been providing local exchange services in California in competition with SBC Pacific since 1997. Although XO has invested a significant amount of capital in California and has built an extensive network in numerous areas throughout the state, XO is still dependent on "last-mile" unbundled network element ("UNE") loop facilities, including high capacity loops, from SBC Pacific in order to compete. Without cost-based rates for these facilities, XO is unable to compete with SBC Pacific. SBC Pacific is not providing cost-based rates for UNE DS1s and DS3s, and for this reason alone, SBC Pacific's Application should be denied.

II. SBC PACIFIC DOES NOT SATISFY CHECKLIST ITEM 2

A. SBC Pacific's DS1 and DS3 UNE Rates Are Not TELRIC-Compliant

SBC Pacific's current statewide average DS1 rate is \$94.43, and its DS3 rate, notably the highest in the entire country, is \$1837.18. Neither of these rates is TELRIC-compliant. Accordingly, the Commission must find that SBC Pacific has failed to satisfy the Section 271 competitive checklist.

With respect to SBC Pacific's UNE DS3 loop rate, it is indisputable that the California Public Utilities Commission ("CPUC") has not approved that rate as a TELRIC-compliant rate. Although the CPUC approved rates for DS1 loops and entrance facilities and DS3 *entrance facilities* in the OANAD Proceeding in which the Commission established UNE rates for SBC

maintenance and repair and therefore does not meet checklist item 4. In addition, XO showed that SBC Pacific has not satisfied checklist item 11, and also fails to satisfy checklist 14.

Pacific, the CPUC did not address DS3 *UNE loop rates* in that proceeding. At the time of the OANAD proceeding, although not legally permitted to do so, SBC Pacific refused to offer CLECs DS3 UNE loops. Accordingly, a rate for such a product was not included in the scope of the OANAD proceeding. It was only after this Commission issued the *UNE Remand Order*³ that SBC Pacific began to offer CLECs DS3 UNE loops. At that time, without input from the CPUC, SBC Pacific unilaterally decided to use the approved DS-3 *entrance facility* price as a surrogate for the DS-3 loop price.⁴

Whether such an approach is or was appropriate is a subject that has been litigated in numerous settings in different states. California, however, was not one of them. Despite XO's and other CLECs' repeated efforts at raising the issue of SBC Pacific's exorbitant DS3 UNE loop rate, the CPUC did not take up the issue until very recently, when the CPUC determined that SBC Pacific's DS1 and DS3 rates will be reviewed in the 2002 UNE review. The Administrative Law Judge's ruling leaves little doubt that even the CPUC considers that the DS3 UNE loop rate was never reviewed:

California prices appear out of line with other states, particularly given Pacific's statements that there is little geographic sensitivity in the cost of providing a DS-3 loop We find that given the competitive importance of the DS-3 loop and *the fact that a cost-based rate for this UNE has never been set*, now is the appropriate time to examine DS-3 loop costs.⁵

³ See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-238, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

⁴ See SBC Pacific Vandeloop Affidavit at ¶ 51 and Scholl Affidavit at ¶ 113.

⁵ *Scoping Memo For Consolidated 2001/2002 Unbundled Network Element (UNE) Reexamination For Pacific Bell Telephone Company*, CPUC proceeding A.01-02-024/A.01-02-035 (June 12, 2002) at 3 (emphasis added) ("Scoping Memo"). A copy of the *Scoping Memo* is attached hereto as Exhibit 1.

The absence of CPUC examination of SBC Pacific's DS3 UNE loop rate alone warrants a finding that SBC Pacific has not met its burden in establishing that its UNE rates are cost-based.

That SBC Pacific's DS1 and DS3 rates are among the highest in the nation provides further evidence that the rates are not cost-based. A significant shortcoming of SBC Pacific's UNE rates is that they were set in 1999 based on 1994 data. There is no question that the costs of providing UNEs in California have declined significantly since 1994. Indeed, the CPUC found that the forward-looking costs of providing UNEs in California have declined significantly since 1994.⁶ Consequently, the CPUC implemented a procedure for reexamining SBC Pacific's UNE rates in order to take into account these cost reductions.

The standard set by the CPUC in Decision No. ("D.") 99-11-050 for establishing that a UNE is ripe for review requires that the "party nominating the UNE for review include summary evidence demonstrating a cost change of at least 20% from the costs approved in D.98-02-106."⁷ XO nominated DS1 and DS3 loops for review by the CPUC.⁸ The CPUC concluded that SBC Pacific's DS1 and DS3 loops rates should be reviewed so that cost-based rates can be set. Thus, the CPUC has already made an initial determination that SBC Pacific's DS1 and DS3 UNE rates are not cost-based.

Furthermore, SBC Pacific's own filings in the CPUC proceeding reviewing SBC Pacific's UNE DS3 loop rate show that SBC Pacific's current rate is not TELRIC-compliant.⁹

⁶ See CPUC D.99-11-050.

⁷ *Scoping Memo* at 3.

⁸ The Commission only accepted XO's DS3 UNE loop nomination, because it stated that the DS1 UNE loop was already within the scope of the 2001 UNE Reexamination Proceeding, although interim rates for DS1 UNE loops were not set in D.02-05-42, the CPUC's Interim Rate Order that adopted lower rates on an interim basis for 2-wire loops and switching. *Scoping Memo* at 4, n.2.

⁹ See October 18, 2002 Comments of Pacific Bell Telephone Company in CPUC proceeding A.01-02-024/A.01-02-035 *et. al.*

Indeed, if SBC Pacific's proposed rate were adopted, the DS3 UNE loop rate would decrease by approximately 66% from \$1837.18 to \$573.20. AT&T's and Worldcom's HAI Model, Version 5.3 ("HM 5.3"), which was filed with the CPUC on October 18, would reduce SBC Pacific's UNE DS3 loop rate from \$1837.18 to \$268.76. Likewise, if HM 5.3 is adopted by the CPUC as the basis for SBC Pacific's UNE loop rates, DS1 loop rates would change from its current statewide average approved rate of \$94.43 to \$20.83.¹⁰

Examination of high capacity UNE loop prices in other states where the Commission has approved Section 271 applications also demonstrates that SBC Pacific's prices are high. The DS1 UNE loop price in California is higher than any of BellSouth's comparable prices as well as the rates in Massachusetts and New York. The SBC Pacific DS1 loop costs CLECs about 24% more than the weighted average UNE loop prices in other SBC states,¹¹ the BellSouth states, and the eastern Verizon states with Section 271 approval. SBC Pacific's DS3 UNE loop price, of course, is well above the prices in all these other states. Rates for individual UNEs may be deemed "TELRIC-compliant" if they fall within a range of reasonableness. SBC Pacific's DS3 UNE loop price does not fall within this range, and SBC Pacific has at least implicitly conceded this point by proposing a revised DS3 UNE loop price that is \$573.20 instead of its current rate of \$1837.18. This new rate is based upon SBC Pacific assumptions and calculations that might, given the rate that AT&T and Worldcom propose, even inflate this revised estimate.¹² As stated above, AT&T and Worldcom have proposed DS3 and DS1 UNE loop rates of \$268.76 and

¹⁰ See October 18, 2002 Comments of AT&T and WCOM in CPUC proceeding A.01-02-024/A.01-02-035 *et. al.*

¹¹ XO could not locate the rates for Southern New England Telephone Company, SBC Pacific's Connecticut affiliate.

¹² *Consolidated 2001/2002 Unbundled Network Element (UNE) Reexamination For Pacific Bell Telephone Company*, CPUC proceeding A.01-02-024/A.01-02-035.

\$20.83 respectively. These new rates would be approximately one-sixth and one-fifth current DS1 and DS3 UNE loop prices. The latter proposal is significant because AT&T's and Worldcom's comparison of the revised loop cost model and the "Synthesis Model" used by the Commission to calculate Universal Service Fund payments, demonstrates that the revised model submitted to the California Commission produces loop investments that are approximately 10% higher than the Synthesis Model values for Pacific Bell in California. It is therefore likely that SBC Pacific's DS1 UNE loop price also falls outside any zone of reasonableness.

B. SBC Pacific Has Not Truly Made A Retroactive True-Up Amendment Available To CLECs

SBC Pacific claims that it has made an interconnection agreement amendment available to CLECs that would make the current DS1 and DS3 loop rates interim and subject to true-up retroactive to September 20, 2002, the date SBC Pacific filed its Application.¹³ The terms and conditions under which SBC Pacific made its offer, however, have made it impossible for XO to accept it. Specifically, XO objected to the inclusion in the amendment to certain "reservation of rights" and other language that was either not at all relevant to the amendment's purpose or was inconsistent with pre-existing terms of XO's interconnection agreement. For example, XO tried to negotiate revisions to the amendment to make it consistent with the underlying interconnection agreement's SBC 13-State Reciprocal Compensation Amendment, an amendment that XO and SBC spent significant time and resources negotiating, but SBC Pacific informed XO that the amendment was "non-negotiable." Finally, earlier today SBC did inform XO that it would agree to make the minor change that XO had requested to the SBC Pacific amendment. Therefore, at this time, XO and SBC Pacific have not executed an amendment to

¹³ See Vandeloop Aff. ¶ 54

implement SBC Pacific's offer. In light of the recent change in SBC Pacific's position, XO expects that it will enter into such an amendment. However, XO raises its concerns at this time, because the amendment is not finalized.

III. SBC IS DENYING REASONABLE ACCESS TO PARKING TO COLLOCATORS

In its Application, SBC Pacific states "[SBC] Pacific provides physical collocators with reasonable access to restroom facilities *and parking*."¹⁴ This statement, however, is not true. Recently, SBC Pacific has begun denying CLECs reasonable access to SBC Pacific's parking facilities at an SBC Pacific central office in the Los Angeles area. Although SBC Pacific previously made parking available to XO at this facility, SBC Pacific recently posted "No Parking" and "SBC Pacific Parking Only" signs at the central office in question.

When this issue arose, XO contacted an Executive Director with SBC Pacific's Regulatory group.¹⁵ This contact informed XO that SBC Pacific's "policy" was to provide collocators with "reasonable access" to SBC Pacific's central office, but that SBC Pacific did *not* provide collocators with access to SBC Pacific's parking facilities. Despite XO's arguments to the contrary, SBC Pacific has not modified its position and is continuing to refuse to provide XO with reasonable access to parking at the central office at issue. XO is concerned about SBC Pacific's misrepresentation regarding its practices with respect to the access it provides collocators to parking. Moreover, XO is extremely concerned that this may be the beginning of SBC Pacific's backsliding and that XO will be denied reasonable access to parking at additional SBC Pacific central offices where XO is colocated. Because there are no performance measures

¹⁴ Shannon Aff. ¶ 69.

¹⁵ SBC Pacific's Executive Director is also an affiant for SBC Pacific's Application on other matters unrelated to the parking issue.

or incentives to address this type of behavior by SBC Pacific, the Commission must address it before it grants SBC Pacific's Application.

IV. CONCLUSION

For the foregoing reasons and those set forth in XO's opening comments, the Commission should deny SBC Pacific's Application for authorization to provide in-region interLATA services in California.

Respectfully submitted

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